

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANGEL NOEL GUEVARA, *et al.*

Defendants.

No. CR 08-0730 WHA

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT GUEVARA'S
MOTIONS TO SUPPRESS
REGARDING EYEWITNESS
IDENTIFICATIONS,
SEARCHES, AND ARREST**

INTRODUCTION

Defendant Angel Noel Guevara moves to suppress eyewitness identifications of him and all fruit flowing from the eyewitness identifications, on the basis that the identifications were unreliable and based on unduly suggestive photographic line-ups (Dkt. No. 1995). Mr. Guevara also seeks to exclude evidence seized as a result of warrant-authorized searches of his residence at 41 Vienna Street in San Francisco, his vehicle, and his person, on the grounds that the searches were premised on unlawful eyewitness identifications, the search warrant was overbroad, and items outside the scope of the warrant were improperly seized (Dkt. No. 1996). Finally, Mr. Guevara seeks to exclude any evidence resulting from his warrantless arrest on December 30, 2007 (*ibid.*). For the reasons stated herein, the motions are **GRANTED IN PART AND DENIED IN PART**.

STATEMENT

As a preliminary matter, a moving defendant must ordinarily comply with Criminal Local Rule 47-2(b), which requires sworn declarations or affidavits for motions presenting issues of fact. Denial of a suppression motion because the moving defendant failed to submit a supporting

1 declaration has been affirmed by the court of appeals. *United States v. Wardlow*, 951 F.2d 1115,
2 1116 (9th Cir. 1991). Here, Mr. Guevara has proffered a declaration establishing his expectation
3 of privacy in the locations searched (Dkt. No. 2299). For the purposes of Mr. Guevara's instant
4 motions, this declaration is sufficient. All other factual issues are either undisputed or are facts
5 that only police officers or unidentified witnesses have personal knowledge of. Thus, Mr.
6 Guevara's proffer of police reports is an adequate basis for his motions, as it is reasonable to
7 presume that the officers would testify in accordance with their own reports. Further, where Mr.
8 Guevara's motion challenges a warrantless search or seizure, the burden is on the government to
9 justify the search or seizure or to show an exception. That is, once Mr. Guevara demonstrates that
10 a warrantless search or seizure occurred, the burden shifts to the government to demonstrate a
11 justification or exception to the warrant requirement.

12 Mr. Guevara's motions are primarily based on his challenge to eyewitness identifications
13 made in connection with two separate incidents that occurred on December 26, 2007. In the first
14 incident, a male victim was stabbed near 24th Street and Shotwell Street in San Francisco. In the
15 second incident, a male victim and a female victim were stabbed near Mission Street and Silver
16 Avenue in San Francisco.

17 **1. STABBING AT 24TH AND SHOTWELL ON DECEMBER 26, 2007.**

18 According to SFPD Officer Lamar Toney's police report, at approximately 7:05 p.m. on
19 December 26, 2007, a male victim ("Shotwell Victim") was attacked with a knife near 24th Street
20 and Shotwell Street in San Francisco (Dkt. No. 1995-1 at 5). Shotwell Victim was stabbed in the
21 face by a man he described as Hispanic and wearing a red shirt. Shotwell Victim sustained a deep
22 four-inch cut on the side of his face. Shotwell Victim told Officer Toney that he would not be able
23 to recognize the assailant if he saw him again.

24 Shotwell Victim gave a slightly different description of his assailant to SFPD Sergeant
25 Dion McDonnell. According to Sergeant McDonnell's police report, Shotwell Victim described
26 the attacker as "a latin male wearing all dark clothing" (Dkt. No. 1995-2 at 18). In contrast to his
27 statement to Officer Toney, Shotwell Victim told Sergeant McDonnell that he believed he could
28 identify the suspect if he saw him again (*id.* at 15). Almost two months after the stabbing,

1 Shotwell Victim identified Mr. Guevara in a photographic line-up (*id.* at 17). This photographic
2 line-up was the first of two male photographic line-ups that Shotwell Victim was given (Dkt. No.
3 2133-5 at 5). Shotwell Victim did not identify anyone in the second line-up, which did not contain
4 a photograph of Mr. Guevara (*id.* at 7). After identifying Mr. Guevara, Shotwell Victim noted that
5 Mr. Guevara yelled “MS” after stabbing him (Dkt. No. 1995-2 at 18).

6 **2. STABBING AT MISSION AND SILVER ON DECEMBER 26, 2007.**

7 About thirty minutes after the stabbing at 24th and Shotwell, a woman and a man were
8 stabbed at a bus stop near Mission Street and Silver Avenue in San Francisco (Dkt. No. 1995-1 at
9 15–16). The police spoke with four witnesses to the stabbings — the female victim (“Mission
10 Female Victim”), the male victim (“Mission Male Victim”), and two witnesses (“Mission Witness
11 No. 1” and “Mission Witness No. 2”) (*id.* at 15–22). There were two assailants — a woman and a
12 man. The male assailant shouted “MS” and stabbed Mission Male Victim (*id.* at 16–17, 20, 37).
13 The female assailant yelled “MS” and stabbed Mission Female Victim (*id.* at 15–18, 39).¹

14 Three of the four witnesses were given a six-pack photographic line-up. Two of these
15 witnesses — Mission Male Victim and Mission Female Victim — were given the same
16 photographic line-up and identified Mr. Guevara (Dkt. Nos. 2133-2, 2133-3). The third witness
17 that was given a photographic line-up — Mission Witness No. 1 — did not make an identification,
18 but stated that the male assailant “looked like” Mr. Guevara (Dkt. No. 1995-1 at 37). Mission
19 Witness No. 1 was given a different photographic line-up from the one given to Mission Male
20 Victim and Mission Female Victim (Dkt. No. 2133-1).

21 Each of the four witnesses provided descriptions of the assailants. As detailed below,
22 however, the witnesses gave slightly varying descriptions of the male assailant.

23 **A. Mission Witness No. 1.**

24 Mission Witness No. 1 was the boyfriend of Mission Female Victim. Mission Witness No.
25 1 gave a number of descriptions of the male assailant to different SFPD police officers. All
26

27
28 ¹ One police report indicated that Mission Witness No. 1 stated that the male assailant stabbed Mission
Female Victim (Dkt. No. 1995-1 at 18). Mission Witness No. 1, however, stated at a different time that he did
not see the stabbing of Mission Female Victim (*id.* at 17).

1 interviews of Mission Witness No. 1 regarding the male assailant's appearance occurred prior to
2 his review of the photographic line-up.

3 Mission Witness No. 1 described the male assailant to Officer Castillo as a Latin male who
4 was five feet six inches tall, 160 pounds, in his thirties, and wearing a black hoodie and jeans (Dkt.
5 No. 1995-1 at 15). Mission Witness No. 1 gave a slightly differing description to Inspector Lau —
6 he told Inspector Lau that the male assailant was in his thirties, five feet eight inches tall, 180 to
7 200 pounds, "stocky," had crew-cut hair slicked back slightly, had a medium complexion with a
8 one to one-and-a-half inch scar or burn on his face/cheek area, may not have had facial hair, and
9 was wearing a dark blue hooded sweatshirt and black pants (*id.* at 36). Mission Witness No. 1 also
10 described the male assailant in two written statements. One statement described him as five feet
11 six inches tall with brown skin, wearing a black hoodie and blue jeans, with a scar on his left cheek
12 (Dkt. No. 1995-2 at 23). The other statement described the male assailant as a 40-year old
13 Hispanic male with brown skin, wearing a hoodie, with a scar on his right cheek (*id.* at 24).

14 Mission Witness No. 1 was unable to identify the male assailant in the line-up give to him,
15 line-up number 7481 (Dkt. Nos. 1995-1 at 37, 2133-1). Mission Witness No. 1, however, stated
16 that one of the individuals in the array (Mr. Guevara) resembled the male assailant.

17 **B. Mission Female Victim.**

18 On the same day as the stabbing, Officer Castillo spoke with Mission Female Victim after
19 she was treated for her injury (Dkt. No. 1995-1 at 15). Mission Female Victim described the male
20 assailant, who accompanied the female assailant, as a Latin male in his thirties, five feet six inches
21 tall, 160 pounds, and wearing a black hoodie. Mission Female Victim stated she would recognize
22 the assailants if she saw them again. Mission Female Victim also provided her description of the
23 male assailant in a written statement (Dkt. No. 1995-2 at 25). The written statement described the
24 male assailant as wearing a black hoodie, as five feet eight inches or nine inches tall, with black
25 hair, brown eyes, and dark skin. It is unclear from the police reports what time Mission Female
26 Victim's written statement was given, although it appears to have been given on the same day as
27 the stabbings (Dkt. No. 1995-1 at 18).

28 The day after the stabbings, Mission Female Victim was given a photographic line-up, line-

up number 7482 (Dkt. Nos. 1995-1 at 38, 2133-2). Line-up number 7482 was different from the line-up given to Mission Male Witness No. 1. Mission Female Victim identified Mr. Guevara as the male assailant. After Mission Female Victim identified Mr. Guevara, Inspector Lau asked her if she remembered a scar on the face of the male assailant, to which she replied that “something” on the male assailant’s face “stood out” (Dkt. No. 1995-1 at 39). Prior to her identification of Mr. Guevara, however, Mission Female Victim did not mention to any police officers that she remembered a facial marking on the male assailant, and Mr. Guevara does not allege that any such pre-identification statement was made.

C. Mission Male Victim.

Mission Male Victim was stabbed in the neck and rib cage by the male assailant (*id.* at 16). On the day of the stabbing, Mission Male Victim stated that he would not be able to recognize the person who stabbed him (*id.* at 20). Mission Male Victim was able to recall, however, that his assailant was a five feet two inches tall Latin male wearing a black hooded sweatshirt.

A week after his stabbing, Mission Male Victim identified Mr. Guevara in a photographic line-up, line-up number 7482 (Dkt. Nos. 1995-1 at 42, 2133-3). This was the same photographic line-up that Mission Female Victim was given. Mission Male Victim was interviewed when he gave the identification and recounted a “teardrop” tattoo under Mr. Guevara’s left eye (Dkt. No. 1995-1 at 42). Mission Male Victim mentioned no other facial marks.

D. Mission Witness No. 2.

Mission Witness No. 2 was interviewed by Inspector Lau two days after the stabbings (*id.* at 40). Mission Witness No. 2 stated that the male assailant was an “older” guy with a scar on his face, who looked “chunky,” and was wearing a black hooded sweatshirt. After being asked to come in to do a photographic line-up, however, Mission Witness No. 2 told Inspector Lau that he “misspoke” and would not be able to identify anyone (*id.* at 41). Accordingly, Mission Witness No. 2 was not presented with a photographic line-up and never made an identification.

3. SEARCHES AND ARREST ON DECEMBER 30, 2007.

On December 30, 2007, Superior Court Judge Harold Kahn authorized a search warrant for 41 Vienna Street in San Francisco, the “person” of Angel Noel Guevara, and any vehicle under the

1 dominion and control of Mr. Guevara (Dkt. No. 1996-1 at 12). “Exhibit A” to the search warrant
2 was attached and incorporated by reference. Exhibit A authorized the seizure of: a DNA sample
3 from Mr. Guevara; a knife or similar cutting instrument capable of cutting and stabbing injuries;
4 bloodstained clothing; and “Gang-related items including but not limited to writings, pictures,
5 videos, clothing, personal accessories such as jewelry, etc., cell phone contents, and information
6 stored on electronic devices pertaining to the Sureño-based gang ‘Mara Salvatrucha’” (*id.* at 18).

7 The search warrant affidavit was signed by Inspector Lau (*id.* at 17). The Lau affidavit
8 detailed that Mr. Guevara was positively identified by Mission Female Victim. The Lau affidavit
9 also noted that Mission Witness No. 1 had stated that Mr. Guevara resembled the male assailant
10 (*id.* at 16). The Lau affidavit did not mention the subsequent identifications by Mission Male
11 Victim and Shotwell Victim, as these two identifications had not yet been made at the time of the
12 warrant application. The Lau affidavit further specified that the witnesses recounted that the
13 assailants yelled “MS” and “Mara Salvatrucha” prior to the stabbings, and that the witnesses
14 believed that the attack involved Mara Salvatrucha (*id.* at 15–16). The Lau affidavit also stated
15 that Inspector Lau’s past experience on the Gang Task Force led him to believe that Mr. Guevara
16 was a member of MS-13 and that the stabbings were gang-related, such that the seizure of gang-
17 related items belonging to Mr. Guevara would assist in the prosecution of the crime as a gang-
18 related crime (*id.* at 17).

19 During the search of 41 Vienna, Mr. Guevara was found in a room adjacent to the kitchen
20 (*id.* at 10). Bullets/rounds were found in drawers of a dresser in that room — .357 magnum rounds
21 were found in a white sock, small caliber bullets were found in a blue beanie cap, and two .380
22 caliber bullets were loose in the drawer (Dkt. Nos. 1996-1 at 7, 1996-3 at 7–9). The following
23 were also seized from the room: a knife, hooded sweatshirts, blue bandanas, a blue beanie, a
24 diploma, a letter to Veronica Hernandez, notebooks/journals, photographs, a camera, hats, a chess
25 and checker board, shirts, a taser, a cell phone, keys, pay stubs, and letters with “Angel Guevara”
26 written on them (Dkt. No. 1996-1 at 4–8). Many of these items had “MS-13” or other gang-related
27 markings on them. Mr. Guevara’s vehicle was also searched and a folding knife, t-shirt, compact
28 discs, pay stub, and blue bandana were all found and seized from the vehicle (*id.* at 4).

1 Mr. Guevara was arrested during the search (*id.* at 10–11). After his arrest, Mr. Guevara
2 was interviewed on tape. Mr. Guevara was advised of his Miranda rights and he stated that he
3 understood each of his rights. Mr. Guevara stated he was not at the scene at the time of the
4 incident and was home at the time of the incident.

5 ANALYSIS

6 1. EYEWITNESS IDENTIFICATIONS.

7 Mr. Guevara challenges the eyewitness identifications associated with both incidents.
8 Specifically, he asserts that the photographic line-ups were unnecessarily suggestive and that the
9 eyewitness identifications were unreliable. This order finds that the photographic line-ups and the
10 circumstances surrounding the eyewitness identifications were not unnecessarily suggestive, let
11 alone so suggestive that there was a substantial likelihood of irreparable misidentification.
12 Consequently, a pretrial determination regarding the reliability of the eyewitness identifications is
13 unnecessary. *See United States v. Bagley*, 772 F.2d 482, 492 (9th Cir. 1985). Such an inquiry is
14 only required where a defendant’s proffer shows that the eyewitness identification procedures
15 were impermissibly suggestive. *Ibid.* No such showing has been made. Thus, the reliability of
16 the eyewitness identifications will be a matter for the jury to consider at trial and this order need
17 only address the suggestiveness of the line-ups. *See Manson v. Brathwaite*, 432 U.S. 98, 116
18 (1977). Each of the challenged line-ups and identifications are now discussed in turn.

19 A. Line-Ups Presented to Mission Victims.

20 Photographic line-up number 7482 was presented to both Mission Female Victim and
21 Mission Male Victim (Dkt. Nos. 2133-2, 2133-3). Both identified Mr. Guevara in the line-up.
22 The line-up included photographs of six individuals. All individuals in the line-up appeared to be
23 of Hispanic or Latin-American descent.

24 Under the totality of the circumstances, the line-up cannot be said to be impermissibly
25 suggestive and there is no allegation that the police officers did anything to threaten the integrity
26 of the photographic line-up. Mr. Guevara points to a number of differences between the
27 individuals in the photographic line-up, but none of these differences are disturbing. *First*, Mr.
28 Guevara argues that his photograph was the only one where the head takes up a significantly

1 smaller portion of the frame than the other photographs. The difference in head size, however,
2 was minimal. The width of Mr. Guevara's face was actually the same size as all but one of the
3 other individuals in the line-up. *Second*, Mr. Guevara argues that the background of his
4 photograph was darker than three of the other photographs, but lighter than two of the other
5 photographs. Again, this difference was minor and did not render the photographic line-up
6 impermissibly suggestive. *Third*, although Mr. Guevara argues that he was the only individual
7 with a receding hairline, looked significantly older than the other individuals in the line-up, and
8 was only one of two individuals with a round face, a review of the photographs does not comport
9 with this assertion. Mr. Guevara did not appear to be much older than the other individuals, at
10 least two other individuals appeared to have receding hairlines, and arguably all of the individuals
11 had round faces.

12 Most notably, Mr. Guevara points out that he was the only individual in the line-up with a
13 widow's peak hairline and the only individual with a facial scar. Neither Mission Male Victim nor
14 Mission Female Victim, however, described the male assailant as having a widow's peak hairline.
15 Nor did they describe the male assailant as having a scar on his face *before* being presented with
16 the line-up. Although Mission Female Victim mentioned she remembered "something" about the
17 male assailant's face, she only stated as much *after* she had identified Mr. Guevara. While it
18 would have been ideal to have had additional individuals in the line-up who had widow's peak
19 hairlines and/or facial scars, the line-up did not give rise to a substantial likelihood of irreparable
20 misidentification. As the court of appeals has noted, participants in line-ups are going to have
21 differing facial characteristics and it would be unduly burdensome to require police officials to
22 obtain photographs of virtually identical individuals for a line-up. *United States v. Barron*, 575
23 F.2d 752, 755 (9th Cir. 1978).

24 Finally, although counsel argued at the hearing that the eyewitnesses may have
25 communicated with each other before their identifications, counsel offered absolutely no support
26 for this claim. In any event, even if there was evidence of improper communication between
27 witnesses, such evidence does not speak to the suggestiveness of the line-up itself or procedures
28

utilized by the police officers. Instead, any such allegations are proper material for cross-examination.

B. Line-Up Presented to Mission Witness No. 1.

Photographic line-up number 7481 was presented to Mission Witness No. 1 (Dkt. No. 2133-1). The line-up included different individuals and a different photograph of Mr. Guevara than the line-up presented to Mission Female Victim and Mission Male Victim. The line-up included photographs of six individuals, all of whom appeared to be of Hispanic or Latin-American descent. Mission Witness No. 1 did not identify Mr. Guevara in the line-up but did specify that the male assailant resembled Mr. Guevara.

Under the totality of the circumstances, the line-up was not impermissibly suggestive. *First*, although Mr. Guevara argues that the photographic line-up was impermissibly suggestive because he was the only suspect looking down, a minor difference in face position does not render a line-up impermissibly suggestive. Notably, line-up number 7482 — also challenged by Mr. Guevara — included only one suspect looking down and although Mr. Guevara was not the suspect looking down, he was still identified by Mission Female Victim and Mission Male Victim (Dkt. Nos. 2133-2, 2133-3). *Second*, although Mr. Guevara objects to the fact that he was the only one with short hair and a moustache, a round face, receding hairline, and looked significantly older than the other individuals, a review of the photographic line-up does not bear out this concern. Other individuals in the line-up also had short hair and a mustache, had round faces, appeared to be of the same age as Mr. Guevara, and one other individual had a receding hairline. *Third*, Mr. Guevara argues that the line-up was unnecessarily suggestive because one individual had a ponytail and another had corn rows, despite Mission Witness No. 1's statement that the assailant had a slicked-back crew cut. Mr. Guevara himself, however, did not have a slicked-back crew cut in his photograph. Moreover, the SFPD's instructions for the photographic line-up clearly warn the potential identifying witness that hair styles may change and that the photographs may be new or old (Dkt. No. 2133-1 at 2).

One difficulty that the government did not directly address in its opposition is the impact of a permanent feature, such as a facial scar, being present on only one individual in a line-up, where

1 the feature was *previously* noted in the identifying witness' description of the suspect (*see* Dkt. No.
2 2133). Prior to being presented with a photographic line-up, Mission Witness No. 1 had noted
3 several times that the male assailant had a scar on his face. Nonetheless, this quandary need not be
4 resolved here because Mr. Guevara's scar was barely visible in the photographic line-up Mission
5 Witness No. 1 was presented with. In fact, other individuals in the line-up had facial imperfections
6 that were much more apparent than any markings on Mr. Guevara's face. In any case, Mission
7 Witness No. 1 ultimately did not even identify Mr. Guevara — clearly indicating that the line-up
8 could not have been so impermissibly suggestive as to result in an "irreparable misidentification."

9 **C. Line-Ups Presented to Shotwell Victim.**

10 Two different male photographic line-ups were presented to Shotwell Victim (Dkt. No.
11 2133-5). The first line-up presented to Shotwell Victim resulted in an identification of Mr.
12 Guevara (*id.* at 5). Mr. Guevara was not included in the second line-up and he does not challenge
13 the second line-up (*id.* at 7). Thus, only the first line-up is discussed herein.

14 The first line-up given to Shotwell Victim was not the same as the line-up given to Mission
15 Male Victim and Mission Female Victim. Although the photograph of Mr. Guevara was the same,
16 the other individuals in the line-up were different. Like the previously-discussed line-ups, the line-
17 up included photographs of six individuals, all of whom appeared to be of Hispanic or Latin-
18 American descent. Also like the previously-discussed line-ups, the line-up was not impermissibly
19 suggestive under the totality of the circumstances.

20 Mr. Guevara argues that he was the only individual in the line-up whose head took up a
21 significantly smaller portion of the frame, that the background of his photograph was darker than
22 the other backgrounds, that his photograph was clearer than the others, that he was the only one
23 with a receding hairline, that he looked significantly older than the other individuals, and that he
24 was the only individual with a visible scar on his face. Again, a review of the photographic line-
25 up does not bear out these concerns. In many instances, the differences between photographs were
26 not readily apparent. Even where there were differences, the differences were not unnecessarily or
27 impermissibly suggestive. *First*, although one individual in the line-up appeared relatively young,
28 the remaining individuals appeared close in age to Mr. Guevara. *Second*, Mr. Guevara's

1 photograph did not appear to be any more clear than the other photographs and the darkness of the
2 background did not render the photograph suggestive. *Third*, Mr. Guevara's hair did not appear
3 markedly different than the others — in fact, four of the other individuals had the same hairstyle.
4 *Fourth*, the difference in Mr. Guevara's head size is minimal. Finally, although Mr. Guevara was
5 the only individual in the line-up with a facial scar, Shotwell Victim had never mentioned a facial
6 marking or scar in his descriptions of the assailant. Accordingly, the photographic line-up was not
7 impermissibly suggestive.

8 **D. Request to Present Memory and Eyewitness ID Expert.**

9 Mr. Guevara requests to present live testimony “by a scholar specializing in the field of
10 eyewitness identification and memory” but only offered *examples* of who that expert *may* be and
11 the general subject matter of the proposed testimony (Dkt. No. 1995 at 14). During the September
12 13 hearing, counsel clarified that the expert testimony would be presented at a pretrial evidentiary
13 hearing, rather than at trial. As no pretrial evidentiary hearing on the reliability of the eyewitness
14 identifications is required, such expert testimony is beside the point.

15 **2. WARRANT-AUTHORIZED SEARCHES ON DECEMBER 30, 2007.**

16 Mr. Guevara argues that the warrant-authorized searches of 41 Vienna, his person, and his
17 vehicle were unlawful because the search warrant was lacking in probable cause. Specifically, Mr.
18 Guevara contends that the search warrant was based entirely on the eyewitness identifications and
19 all evidence seized as a result of the eyewitness identifications must be suppressed as “fruit of the
20 poisonous tree.” This argument is rejected. As stated above, the eyewitness identifications were
21 not impermissibly suggestive and were thus a proper basis for probable cause. Additionally,
22 although Mr. Guevara originally argued that the warrant was invalid because there was no
23 probable cause to place his photographs in the photographic line-ups, Mr. Guevara subsequently
24 conceded that there is no probable cause requirement to place an individual's photograph in a line-
25 up (Dkt. No. 2172 at 3).

26 Mr. Guevara also argues that the warrant was facially overbroad and insufficiently
27 particular. This argument is also rejected. In determining whether a warrant is overbroad and
28 insufficiently particular, one or more of the following questions may be considered: (1) whether

1 probable cause exists to seize all items of a particular type described in the warrant; (2) whether
2 the warrant sets out objective standards by which executing officers can differentiate items subject
3 to seizure from those which are not; and (3) whether the government was able to describe the items
4 more particularly in light of the information available to it at the time the warrant was issued.
5 *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986). Here, the warrant was not overbroad
6 as there was probable cause to seize all items described in the warrant — a DNA sample, a knife
7 or similar cutting instrument (the suspect weapon), bloodstained clothing that may have been worn
8 during the stabbings, and items related to Mara Salvatrucha. The Lau affidavit specified that
9 Mission Female Victim identified Mr. Guevara as the male assailant and Mission Witness No. 1
10 stated Mr. Guevara resembled the male assailant. From this, Judge Kahn reasonably concluded
11 that there was a fair probability that evidence of the stabbings would be found at Mr. Guevara’s
12 residence, in his vehicle, or on his person. Additionally, unlike *Millender v. County of Los*
13 *Angeles*, __ F.3d __, 2010 WL 3307491 (9th Cir. Aug. 24, 2010), the affidavit established
14 probable cause that Mr. Guevara’s suspected gang-affiliation was directly related to the stabbings.
15 The Lau affidavit explained that the male assailant yelled “MS” and “Mara Salvatrucha” during
16 the stabbings, indicating the stabbings were likely gang-motivated.

17 As for particularity, Exhibit A to the warrant offered sufficient guidance for the executing
18 officers to determine which items were subject to seizure and which items were not. *See Spilotro*,
19 800 F.2d at 963. The warrant was not a “general” warrant — the officers were to seize specifically
20 enumerated items that were direct evidence of the stabbings, or items that specifically pertained to
21 Mara Salvatrucha. Warrants may authorize a search for classes of generic items where the
22 government is not “able to describe the items more particularly in light of the information
23 available to it at the time the warrant was issued.” *Ibid*. Here, the nature of the evidence sought
24 was not amenable to more particular description.

25 In any event, the warrant was not so facially overbroad or insufficiently particular that the
26 *Leon* good-faith exception does not apply. The officers’ reliance on the Judge Kahn’s probable
27 cause determination and on the technical sufficiency of the warrant was objectively reasonable.
28

1 See *United States v. Leon*, 468 U.S. 897, 923 (1984). Thus, the exclusionary rule does not apply to
2 the items seized pursuant to the warrant.

3 **3. SEIZURE OF BULLETS/ROUNDS DURING SEARCH OF 41 VIENNA.**

4 During the warrant-authorized search of 41 Vienna, the officers seized ammunition found
5 in a dresser in Mr. Guevara's bedroom. Specifically, the officers seized .357 magnum rounds that
6 were stored inside a white sock, small caliber bullets stored in a blue beanie, and two .380 caliber
7 bullets that were loose in a dresser drawer. The warrant, however, did not authorize seizure of
8 ammunition or firearms. Accordingly, Mr. Guevara argues that the officers' seizure of the
9 ammunition was outside of the scope of the warrant.

10 At the September 13 hearing, the government argued for the first time that the bullets found
11 in the blue beanie — the small caliber bullets — were gang-related material because they were
12 found inside gang-related material. Although the police records do not specify that this is why the
13 small caliber bullets were seized, the inquiry is not what the seizing officers believed, but what
14 would have been objectively reasonable given what the officers perceived at the time. *United*
15 *States v. Prim*, 698 F.2d 972, 975 (9th Cir. 1983). It would have been objectively reasonable for
16 an officer to view bullets stored within a blue beanie — arguably an item related to Mara
17 Salvatrucha — to be part and parcel of that gang-related item.² The seizure of the small caliber
18 bullets was accordingly a warrant-authorized seizure of gang-related materials.

19 The government, however, has not argued that the seizure of the .357 magnum rounds and
20 the .380 caliber bullets was pursuant to the gang-related material provision of the warrant. Unlike
21 the small caliber bullets, the .357 magnum rounds and the .380 caliber bullets were not stored
22 inside any items that could have been construed by the searching officers to be gang-related — the
23 .357 magnum rounds were stored in a white sock and the two .380 caliber bullets were loose in a
24 dresser drawer. The seizure of the .357 magnum rounds and .380 caliber bullets was thus outside
25 the authority of the warrant. Consequently, the seizure was unlawful unless the government
26 demonstrates that an exception to the warrant requirement applies.

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² The color blue is allegedly the "gang color" of Mara Salvatrucha.

1 To justify the seizure of the .357 magnum rounds and the .380 caliber bullets, the
2 government entirely relies on its argument that the ammunition was properly seized under the
3 plain-view doctrine. In order to have properly seized the ammunition under the plain-view
4 doctrine, the officers must have been lawfully searching the dresser drawers and the incriminatory
5 nature of the ammunition must have been *immediately* apparent. *See Horton v. California*, 496
6 U.S. 128, 136–137 (1990). Although the officers’ examination of the contents of the dresser
7 drawers was permissible because the warrant authorized a search for items that may have been
8 located in the drawers, the ammunition was not properly seized because the incriminatory nature
9 of the ammunition, if any, was not immediately apparent. Ammunition is not automatically
10 contraband that may be seized without a warrant. *United States v. Blom*, 242 F.3d 799, 808 (8th
11 Cir. 2001); *United States v. Lemons*, 153 F. Supp. 2d 948, 959–960 (E.D. Wis. 2001). The
12 government’s only proffered authority to support its claim that ammunition alone is contraband is
13 *United States v. Stafford*, 416 F.3d 1068 (9th Cir. 2005). The government, however, overlooks the
14 critical fact that the officers in *Stafford* reasonably believed they were seizing *armor-piercing*
15 bullets — bullets that are *per se* illegal to possess in California. *Id.* at 1076–78. Similarly, the
16 government cites *United States v. Wong*, 334 F.3d 831, 838 (9th Cir. 2003), for the proposition
17 that a plain-view seizure of pornography was permissible even though the warrant only permitted a
18 search of murder evidence (Dkt. No. 2142 at 6–7). Again, the government overlooks the critical
19 detail that the seized pornography was *child* pornography — which is *per se* illegal contraband.

20 There is no indication that the officers actually perceived the ammunition to be *per se*
21 illegal ammunition. The search warrant return and the police reports clearly specified that the
22 officers perceived the bullets/rounds to be .357 magnum rounds and .380 caliber bullets — neither
23 of which are illegal to possess. There is also no indication that the ammunition was perceived to
24 be linked to criminal activity. The warrant and the warrant affidavit made no reference to
25 firearms, ammunition, or unlawful acts involving either. Similarly, the government has not alleged
26 that, at the time of the search, Mr. Guevara was suspected of committing any other crimes besides
27 the stabbings. Nor does the government claim that Mr. Guevara was a felon or on probation or
28 parole such that possession of ammunition would have been *per se* illegal.

1 Although the government argues that the ammunition was “legitimate contraband for a
2 documented gang member,” the government has failed to provide any authority that supports its
3 contention that an alleged gang member is prohibited from possessing otherwise legal ammunition
4 (*id.* at 7). Possession of the type of ammunition seized from Mr. Guevara was not illegal in
5 California and Mr. Guevara’s suspected gang membership did not change that. Mr. Guevara’s
6 storage of unused ammunition in his dresser drawers did not violate any of the penal code
7 provisions cited by the government and there was no probable cause for the officers to believe that
8 the ammunition was evidence that a crime had been committed. Thus, the government has failed
9 to show that the seizure of the .357 magnum rounds and the .380 caliber bullets was a permissible
10 warrantless seizure under the plain-view doctrine.

11 The government’s sole argument as to why the exclusionary rule should not apply to any of
12 the searches at issue is that the officers believed they were “searching pursuant to a validly
13 obtained warrant” (Dkt. No. 2142 at 7). This argument, however, does not support application of
14 the good-faith exception to the unlawful seizure of the .357 magnum rounds and the .380 caliber
15 bullets. There is no indication that the officers actually believed the seizures were authorized by
16 the warrant, nor that the officers could have reasonably believed the seizures were authorized. The
17 government has asserted no other basis for the application of the good-faith exception to the .357
18 magnum rounds and the .380 caliber bullets. Thus, the government has failed to show that the
19 exclusionary rule should not apply to the .357 magnum rounds and the .380 caliber bullets.

20 **4. WARRANTLESS ARREST ON DECEMBER 30, 2007.**

21 Mr. Guevara seeks to exclude any evidence seized as a result of his warrantless arrest on
22 December 30, 2007. Mr. Guevara does not challenge the officers’ entry into his residence, as the
23 officers had entered pursuant to a search warrant, but argues that there was no probable cause to
24 arrest him (Dkt. No. 1996 at 12). Probable cause for a warrantless arrest exists if the totality of
25 circumstances would justify a prudent person’s belief that the suspect had committed a crime.
26 *Beck v. Ohio*, 379 U.S. 89, 91 (1964). For the same reasons that there was probable cause for the
27 search warrant to issue, there was probable cause to arrest Mr. Guevara. Mr. Guevara had been
28 identified by an eyewitness as the perpetrator of at least one stabbing. A prudent person would be

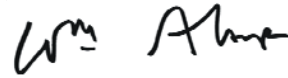
1 reasonable in believing that Mr. Guevara had committed a crime. Accordingly, the arrest of Mr.
2 Guevara was lawful.

3 **CONCLUSION**

4 For the reasons stated herein, Mr. Guevara's motions to suppress are **GRANTED IN PART**
5 **AND DENIED IN PART**. Mr. Guevara's motions are **DENIED**, except as to the .380 caliber bullets
6 and .357 magnum rounds. The seizure of the .380 caliber bullets and .357 magnum rounds was
7 unlawful. Mr. Guevara's motion to suppress the .380 caliber bullets and .357 magnum rounds is
8 **GRANTED**.

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10 **IT IS SO ORDERED.**

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12 Dated: September 28, 2010.



13 WILLIAM ALSUP
14 UNITED STATES DISTRICT JUDGE
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